NO. 85-493

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1985

IN THE MATTER OF
NEVILLE J. REEHLMAN, M.D.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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28pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals, Fifth Circuit erred in upholding the trial court's finding that petitioner had violated 18 U.S.C. §401.

2. Whether the United States Court of Appeals, Fifth Circuit, erred in upholding the fine imposed upon petitioner in the amount of Fourteen Thousand Five Hundred Six and 98/100 ($14,506.98) Dollars for violation of 18 U.S.C. §401, thereby creating a conflict among the federal circuits as to the excessive nature of the fine.

LIST OF INTERESTED PERSONS

Counsel for petitioner, Neville J. Reehlman, M.D., certify that the following listed parties have an interest in the outcome of this case. This representation is made pursuant to Rule 21.1(b) of the Rules of the Supreme Court of United States:

Neville J. Reehlman, M.D.

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The Opinion of the United States Court of Appeals, Fifth Circuit, in this matter has been published in the West Reporter System as *In the Matter of Neville J. Reehlman, M.D.*, 763 F.2d 670.

STATEMENT OF JURISDICTION

The jurisdiction of this Court arises under 28 U.S.C. §1254, and the basis on which this Petition is predicated is Rule 17.1(a) of the Rules of the Supreme Court of the United States. Petitioner was originally fined for violation of 18 U.S.C. §401 on September 13, 1984, before the Honorable A. J. McNamara, District Judge for the United States District Court, Eastern District of Louisiana. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit and a decision by a three-member panel of that Court was rendered on June 4, 1985. Petitioner's Request for Rehearing and Alternatively, Rehearing En Banc was denied on July 8, 1985.

STATEMENT OF STATUTES INVOLVED

This matter involves the interpretation of the following statutes:

A) 18 U.S.C. §401

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other as:

1) Misbehavior of any persons in its presence or so near thereto as to obstruct the administration of Justice;

2) Misbehavior of any officers in their official transactions;

3) Disobedience or resistence to its lawful writ, process, order, rule, decree or command.

B) 18 U.S.C. §1(3)

Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or fine of not more than Five Hundred Dollars, or both, is a petty offinse.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

Petitioner was issued an Order To Show Cause on September 7, 1984, at 9:00 a.m. why he should not be held in criminal comtempt for failing to appear and testify on August 20, 1984 in the case of "Rex Allen Hesler v. Gulf Oil Corporation", United States District Court, Eastern District of Louisiana, Civil Action Number 81-4398. Service of the Show Cause Order was made to petitioner's office on August 22, 1984, and to petitioner personally on September 5, 1984.

On September 7, 1984, following the hearing on the aforesaid Order To Show Cause, petitioner was found by the Honorable A. J. McNamara to be in violation of 18 USC Section 401 for his failure to appear and testify in the aforenamed matter on August 20, 1984. Fines were assessed in the following particulars:

1. To the Clerk of Court, United States District Court, Eastern District of Louisiana $1,000.00.
2. To the folowing attorneys in the *Rex Allen Hesler v. Gulf Oil Corporation* matter
   - A. Nathan Greenburg $2,036.25
   - B. James Holmes $3,959.00
   - C. James Selman $6,761.73
3. To plaintiff Rex Hesler in the aforenamed civil matter $750.00.

Petitioner was ordered to pay the fines imposed within 15 days of the date of entry of the order, September 10, 1984.

On September 17, 1984, petitioner gave notice of appeal of the decision of the Honorable A. J. McNamara in

this matter. In furtherance of the appeal, petitioner filed a $1,000.00 supersedeas bond to stay the enforcement of the Judgment.

On June 4, 1985, a three member panel of the United States Court of Appeals, Fifth Circuit, upheld the fine imposed upon petitioner in the aggregate amount of $14,506.98 for violation of 18 U.S.C. §401. The panel rejected petitioners arguments that the trial court erred in finding petitioner guilty of 18 U.S.C. §401, and further that the Trial Court erred in fining petitioner in the aforesaid amount. Petitioner petitioned the Court for Rehearing En Banc which was denied on July 8, 1985.

B. Statement of the Facts

Petitioner, Neville J. Reehlman, M.D., an orthopedic surgeon, practicing in the New Orleans community, was the orthopedist for Rex Allen Hesler. Due to his treatment of Mr. Hesler, he was subpoenaed to testify in the personal injury lawsuit that Mr. Hesler filed in the United States District Court, Eastern District of Louisiana against Gulf Oil Corporation titled "Rex Allen Hesler v. Gulf Oil Corporation", Civil Action No. 81-4398.

Petitioner had previously been subpoenaed for trial in this matter on February 27, 1984. As a result of that subpoena, petitioner cancelled his entire schedule for the day and closed his office. He was *not* notified that the trial had been continued and that he did not have to appear. (Record pp 12-13).

Subsequently, Petitioner received two letters from Rex Hesler's attorney, Nathan Greenburg, relative to the resetting of the trial. Those letters were dated April 10,

1984 and July 13, 1984 and were admitted into the record of petitioner's proceeding. The letters detailed that trial in the Hesler matter had been reset for August 20, 1984.

A subpoena for the new trial date was served on Dr. Reehlman's office on August 9, 1984. (Record p. 4).

Petitioner had appeared as a witness for Greenberg on numerous occasions, and there was an understanding between Greenburg and petitioner that the parties would communicate by telephone prior to the time of trial to arrange a convenient time for petitioner's testimony. Petitioner had always been cooperative with this type of scheduling. (Record pp. 14-16).

On Thursday, August 16, 1984, the Thursday before the trial on Monday, petitioner decided to go on a much needed vacation. Petitioner had not taken a vacation from his practice in over one year and due to the stressful situation of his practice, felt that an immediate vacation was medically necessary. (Record pp. 22-23).

On that day, petitioner had his office manager, Jennie Dalton, to contact Greenburg's office to notify them of petitioner's desire to take his vacation. Ms. Dalton contacted Greenburg's office on Friday morning and informed the receptionist of petitioner's plans. The receptionist said that she would have someone get back in touch with Ms. Dalton concerning the status of the trial. No one returned Ms. Dalton's call. (Record p-10).

Petitioner left on his vacation on Friday, August 17, 1984 at approximately 1:00 p.m. (Record p. 20-30).

On Monday morning, August 20, 1984, the day of the Hesler trial, Ms. Dalton again attempted to contact Greenburg at his office at 8:00 a.m. and 9:15 a.m. On the second

call, Ms. Dalton was able to speak with the attorney's secretary and informed her of the situation. At this point, petitioner's office was under the assumption that the Hesler trial had either settled or been continued, as no one had contacted them to schedule petitioner's testimony, or had returned the call of Friday to Greenburg's office relative to petitioner's desire to take a vacation. (Record p. 13). Later that day it was discovered that in fact the trial had commenced and that petitioner was not available for trial.

ARGUMENT

1. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S ACTION FINDING PETITIONER IN VIOLATION OF 18 U.S.C §401

Petitioner was found by the trial court to be in violation of Title 18, United States Code, Section 401, Disobedience to a Lawful Writ, Process, Rule, Order, Decree, or Command of the Court. (record p.41)
The statute states as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as:
>
> (1) misbehavior of any persons in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) misbehavior of any officers in their official transactions;

> (3) disobedience or resistence to its lawful writ, process, order, rule, decree, or command.

Petitioner was found guilty of criminal contempt, and not of civil contempt. An essential element in establishing criminal contempt is the proof beyond a reasonable doubt that petitioner intended by his actions to be in contempt of the court. *In re Kirk*, 641 F. 2d 684 (9th Cir. 1981); *United States v. Marx*, 553 F. 2d 874 (4th Cir. 1977).

As stated by the District of Columbia circuit in *In Re Farguhar*, 492 F. 2d 561 (D.C. Cir. 1973):

> Criminal contempt requires both a contemptuous act and a wrongful state of mind.

The record on petitioner's hearing in the district court reflects that the petitioner did not have the requisite state of mind to be held in violation of 18 USC §401.

Petitioner left on a much needed vacation under the assumption that the Hesler matter had either been settled or continued again. Petitioner's office manager testified that she attempted to contact Nathan Greenburg, the attorney who had issued the subpoena to petitioner, on Friday, August 17, 1984, prior to petitioner's departure. It should also be noted that the Friday in question was the Friday before the trial was to commence on the following Monday. The office manager then assumed that the trial had either settled or been continued (Record p. 13).

This assumption by the office manager and by Dr. Reehlman is a valid one in light of the fact that Mr. Greenburg had subpoened petitioner on numerous prior occasions for different cases, and was in such frequent contact

with the office mangager that she and Mr. Greenburg were on a first name basis. (Record p. 16). Further, the particular trial for which petitioner was subpoened had been set in February of the same year and was continued without any notification to petitioner's office. In fact, petitioner had cancelled his patients' appointments for the prior setting, and had closed his office in order to attend the trial. (Record p. 12).

Petitioner's failure to appear at the trial for which he was subpoened amounts to no more than a miscommunication between petitioner and counsel who subpoened him.

It is a long standing tradition within the New Orleans legal community that physicians although subpoened for the start of a trial never have to appear on the date and time that the trial initially commences. Rather, specific times are scheduled for physicians to testify. This is done in order to accommodate a physician's schedule so that he may continue to provide health care to the community, without a severe interuption of the physician's practice. Furthermore, it is common custom to insure that physician witnesses are informed of the status of a trial during the week prior to the trial, so that they may make any alterations in their schedules as needed.

This arrangement has been codified in the *Inter-Professional Code for Physician and Attorneys, State of Louisiana*, which was adopted in 1961 and amended in 1984. The Code was formulated by a committee composed of members of the Louisiana State Medical Society and the Louisiana State Bar Association. It was approved by the House of Delegates of both organizations in 1961, and the amendments were subsequently approved in 1984.

The intention of the Code is to promote cooperation between doctors and lawyers in the State of Louisiana, and, as stated in the Preamble, "facilitate the fair and impartial administration of justice."

The Code contains a specific section entitled "Arrangements for Court Appearances." This section of the Code states in pertinent part;

> "While it is recognized that the conduct of the business of the Courts cannot depend upon the conveience of litigants, lawyers or witnesses, *arrangments can and should be made* for the attendance of physicians as a witness which take into consideration the professional demands upon his time. Such arrangements contemplate reasonable notice to the physician of the intention to call him as a witness and to advise him *by telephone* of the approximate time of this required attendance as well as any postponement or settlement of the case. The attorney should make every effort to conserve the time of the physician. Likewise, the physician should be punctual in giving his testimony by deposition or in court, emergencies being excepted." *Inter-Professional Code*, supra at p. A3-A4

The aforecited *Inter-Professional Code* was presented to the Fifth Circuit Court of Appeals along with the urging by petitioner that pursuant to Rule 201 of the Federal Rules of Evidence, the Court of Appeals take judicial notice of the doctor-lawyer subpoena arrangement within its territorial jurisdiction.

The opinion of the Fifth Circuit Court of Appeals appears to completely ignore both the representations made by petitioner at the time of trial, and those made by his office manager, and further the arrangements as detailed within the aforesaid *Inter-Professional Code.* For instance, petitioner and his office manager testified at the time of

trial that he had been subpoenaed for the same matter on a previous occasion, and had been forced to cancel the day's appointments in order to attend the trial. He discovered, upon appearing for the trial, pursuant to the Subpoena that the trial has in fact been cancelled and that he had not been notified. The Fifth Circuit in its opinion characterized the cancellation as follows:

> "On the day of a previous setting of Mr. Hesler's case, he had been under four subpoenas, had cancelled the days appointments, and had spent the day *cooling his heels* when all of these matters were cancelled, settled or continued." *In the Matter of Neville J. Reehlman, M.D.*, 763 F.2d 670 (5th CIr. 1985). (Emphasis added).

Nowhere in the Fifth Circuit opinion is any reference to the *Inter-Professional Code.*

The record below clearly reflects that the first notification to petitioner's office that the trial for which he was subpoened was in fact being held was the day of the trial, August 20, 1984. As stated earlier, attempts had been made prior to petitioner's departure to contact Hesler's attorney's office, but to no avail. Therefore petitioner's assumption that the trial had either settled or been continued was logical considering his on-going relationship with that particular attorney, and further considering the cancellation of the same trial on a previous date, which resulted in petitioner's loss of practice for one day. Furthermore, it is clear that petitioner did not possess the requisite criminal intent for a conviction of criminal contempt.

Petitioner respectfully asserts that the actions taken by the Trial Court and the Fifth Circuit Court of Appeals

in this matter are such a departure from the accepted and usual course of judicial proceedings, with particular reference to criminal contempt proceedings for failure to appear pursuant to subpoena, that it calls for an exercise of this court's power of supervision, subsequent to the filing of briefs and Arguments by counsel.

II. BY UPHOLDING THE FINE IMPOSED BY THE DISTRICT COURT IN THIS MATTER, THE UNITED STATES COURT OF APPEAL, FIFTH CIRCUIT, HAS CREATED A CONFLICT AMOUNG THE CIRCUITS RELATIVE TO ACCEPTABLE FINES FOR LIKE OFFENSES

For his violation, petitioner was fined $14,506.98. One Thousand Dollars of that fine was assessed to the Clerk of Court, United States District Court, Eastern District of Louisiana. The balanced was apportioned amoung the various litigants involved in the Hesler matter. Petitioner asserts to this Honorable court that the fine imposed upon him for violation of 18 USC section 401 was excessive in light of the circumstances surrounding his failure to appear to testify in the Hesler matter, as previously set forth.

Petitioner urged the Fifth Circuit to strike or alternatively reduce the fine imposed, as the amount originally fined was characteristic of a "serious offense" pursuant to the definition of 18 U.S.C. §1(3).

The District of Columbia Circuit was the first circuit to address the issue of the severity of a fine upon an individual, convicted of criminal contempt, as opposed to a fine imposed upon a corporation, union or other group of

persons. In *Douglass v. First National Realty Corporation*, 543 F. 2d 894 (D.C. Cir. 1976), the court discussed the legal limit of fines permissible in criminal contempt convictions of individuals. The court determined that in criminal contempt proceedings, without a jury trial or waiver thereof, the fines against individuals must be limited to $500. *Douglass*, at 902.

Prior to the *Douglass* decision, this Court in *Muniz v. Hoffman*, 422 U.S. 454, 95 S.Ct. 2178 (1975) had rejected the proposition that criminal contempt must be considered a serious crime under all circumstances if the fine imposed were more than $500.00 unaccompanied by a term of imprisonment. However, in *Muniz*, the court was dealing with a fine imposed upon a union pursuant to a non-jury contempt proceeding. In that matter, it was held that a $10,000.00 fine upon a union was not excessive. Petitioner asserts that the excessiveness of a fine placed upon him cannot be weighed in the same light as that placed upon a union, such as that existing in the *Muniz* decision.

The record in petitioner's matter is void of any reference to a jury trial. It was neither demanded, offered by the court, nor waived by the petitioner. As noted by the court in *Douglass*:

> Although petitioner did not demand a jury trial, he did not waive it, for no jury trial was offered. Instead, he acquiesced in a proceeding charted from the start as non-jury, and hence one for a petty offense." Id at 902.

As the Record will reflect, petitioner also acquiesced in his proceeding, which from its inception was a non-jury proceeding. The rule to show cause against petitioner was issued on August 21, 1984, the day after trial was to com-

mence in the Hesler matter. Petitioner was cited to appear on the 7th day of September, 1984. Petitioner acquiesced and appeared on that day. No mention is made in any part of the record as to petitioner's entitlment to a trial by jury due to the severity of the offense. The reasoning in *Douglass*, has been followed by the First Circuit, *U.S. vs. Professional Air Traffic Controllers*, 678 F. 2d 1 (1st Cir. 1982), the 8th Circuit, *Girard v. Goins*, 757 F. 2d 160 (8th Cir. 1978), the 9th Circuit, *U.S. v. Hamdan*, 552 F. 2d 276 (9th Cir. 1977), and the 10th Circuit, *U.S. v. McAlister*, 630 F. 2d 772 (10th Cir. 1980).

In *Girard*, supra, although the court did not necessarily agree with the $500.00 limitation imposed in *Douglass*, it did state that a criminal contempt fine on an individual, ranging from $2500.00 to $10,000.00 was excessive and inappropriate without benefit of a jury. *Goins* at 280.

The Fifth Circuit panel chose to ignore the *Douglass* line of cases and found that a fine in excess of $14,000.00 upon petitioner was not excessive, absent a jury. *Reehlman* 763 F. 2d at 671.

There is no question as to whether the original proceeding before the trial court was a civil contempt proceeding or a criminal contempt proceeding. Petitioner was found by the Trial Court to be in violation of criminal contempt, and this was reiterated by the Fifth Circuit Panel in its opinion. *Reehlman*. 763 F. 2d at 671. Therefore, the Fifth Circuit's departure from the *Douglass* line of cases and the new interpretation that it places upon the *Muniz* decision, creates a severe conflict among the circuits. Had petitioner been found in violation of 18 U.S.C. §401 in either the D.C. Circuit, the Eighth Circuit, the Ninth Circuit, or the Tenth Circuit, his fine would have been severly reduced, or he would have been entitled to a proceeding before a jury.

Petitioner therefore respectfully urges this Court to examine more closely the conflict created by the Fifth Circuit's decision in this matter and to determine conclusively whether or not the fine of $14,506.98 was excessive.

Respectfully Submitted,

WIEDEMANN & FRANSEN

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CERTIFICATE OF SERVICE

I do hereby certify as a member of the Bar of this Court, that three copies of the Petition for Writ of Certiorari have been forwarded to William F. Baitty, Counsel for United States District Court, Eastern District of Louisiana, this 7th day of August, 1985.

_____

LAWRENCE D. WIEDEMANN
Counsel of record
for Petitioner

Appendix A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Sep. 14, 1984

IN THE MATTER OF: MISCELLANEOUS

NEVILLE J. REEHLMAN, M.D. No. 1372

CRIMINAL CONTEMPT PROCEEDINGSECTION "D"

CONTEMPT ORDER

The Court having on September 7, 1984, found Neville J. Reehlman, M.D. to be in Criminal Contempt for violating the Court's subpoena to appear and testify at the trial of Rex Hesler vs. Gulf Oil Corporation, Civil Action 81-4398, Section D, on August 20, 1984; accordingly.

IT IS ORDERED that Neville J. Reehlman, M.D. is hereby fined the following amounts to be paid to the respective parties:

Rex Hesler	$750.00
Nathan Greenberg, Esq.	$2,036.25
James Holmes, Esq.	$3,959.00
James Selman, Esq.	$6,761.73
Clerk of Court (Jury Costs)	$1,000.00

IT IS FURTHER ORDERED that the fines imposed by the Court are to be paid within fifteen (15) days along with the certificate confirming payment to be filed in the record.

Dated at New Orleans, Louisiana, this 13 day of September, 1984.

/s/

UNITED STATES DISTRICT JUDGE

Appendix B

In the Matter of Neville J.
REEHLMAN, M.D.,
Appellant.

No. 84-3670
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 4, 1985

After a hearing at which he and his office manager testified, appellant Reehlman, an orthopedic surgeon, was adjudged in contempt for disobeying a subpoena directing his appearance at the trial of a personal injury case brought by one of his patients, a Mr. Hesler. Before us, he advances two issues for reversal: that the evidence, properly viewed, revealed a mere failure of communication, not a contempt; and that the fines imposed, aggregating almost fifteen thousand dollars, were excessive. We affirm.

The record indicates that Dr. Reehlman's practice brought him to court frequently to testify on behalf of his patients, often under subpoena. On the day of a previous setting of Mr. Hesler's case, he had been under four subpoenas, had cancelled the day's appointments, and had spent the day cooling his heels when all of these matters were cancelled, settled or continued.

Mr. Hesler's case was reset for trial on August 20, his attorney notifying Dr. Reehlman by letter of April 10. To this, Dr. Reehlman responded that it was too early to fix his schedule. Counsel wrote again on July 13, reminding Dr. Reehlman of the August 20 setting and advising him that he would be subpoenaed. To this, he did not reply.

On August 8, he was served. A week later, on the Thursday before trial, Dr. Reehlman suddenly decided to take a Spanish vacation, leaving the next day without attempting to be excused from the subpoena. On Monday, after the jury was empanelled, it was discovered that Dr. Reehlman was gone. At the show cause hearing, he testified that because no one had called to schedule his testimony and because a call to counsel's office on Friday had not been returned, he assumed that the case had been settled or continued. The court held him in criminal contempt, fining him various sums designed to compensate Hesler, various counsel and the clerk for their lost time and expense and directing that he pay these amounts to them.

[1,2] Appellant's first point comes to no more than a claim that the court was required to accept his explanation of how he came to disobey its lawful process in breach of 18 U.S.C. § 401(3). Criminal contempt is a crime. *United States v. Williams,* 622 F.2d 830 (5th Cir.1980), *cert. denied*, 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114 (1981). As such, the requisite standard of proof is "beyond a reasonable doubt." Certainly, on the evidence that we have sketched above, the court could have concluded with that degree of certainty that Dr. Reehlman decided simply to flout the court's order by departing on a spur-of-the-moment foreign trip at a time when he knew he was under subpoena without determining that he had been released.

[3] As for the claim that the aggregate fine imposed was excessive, we commence with the assumption that the proceeding was a criminal one. despite the secondary, remedial purpose of the order. *Thyssen,Inc. v. S/S Chuen On*, 693 F.2d 1171, 1174 n. 4 (5th Cir.1982). Neither this circuit nor the Supremem Court has adopted any bright-line rule limiting fines in criminal contempt proceedings. *Muniz*

v. Hoffman, 422 U.S. 454, 95 S.Ct. 2178, 45 L.Ed.2d 319 (1975) ($10,000 fine against union did not require jury trial). The fines imposed here were substantial, but so was the expense and inconvenience to which he deliberately put the parties for whose benefit, in part, the fines were levied. It is apparent from the record that the amounts fixed by the court represented its conscientious effort to make whole those whom Dr. Reehlman's willful act had injured. It will be an unusual case in which fines fixed in such a manner will be found excessive.

AFFIRMED.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed July 8, 1985

No. 84-3670

IN THE MATTER OF:
NEVILLE J. REEHLMAN, M.D.,
Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion June 4, 1985, 5 Cir., 198____, _____F.2d_____)

(July 8, 1985)

Before GEE, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The Judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in

favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge